

Internal Revenue Service  
**memorandum**

CC:TL:Br3  
GEBowden

date: FEB 3 1989

to: District Counsel, Atlanta SE:ATL

from: Chief, Branch 3, Tax Litigation Division CC:TL:Br3

subject: [REDACTED]

You have requested our advice as to two questions relating to the use of mitigation statutes.

ISSUES

1. Are the amended returns attached to the [REDACTED], [REDACTED] and [REDACTED] returns sufficient claims for refund for purposes of I.R.C. § 1313(a)(3)(A).

2. Should the Service issue a statutory notice of deficiency for [REDACTED] and [REDACTED] prior to the posting of credits for refund for [REDACTED], [REDACTED] and [REDACTED].

FACTS

Briefly, taxpayers claimed a sale of apartments in [REDACTED] as an installment sale. We challenged this treatment but did not prevail. [REDACTED]. The amended returns at issue for [REDACTED] and [REDACTED] reflect a position consistent with our position in that litigation, the amended return for [REDACTED] reflects a position consistent with the taxpayer's position in the litigation. The return for [REDACTED] is consistent with the Service's position, as is the amended return in [REDACTED]. The result of applying the Court's rationale to these years is refunds due taxpayers in [REDACTED], [REDACTED] and [REDACTED] and deficiencies in [REDACTED] and [REDACTED]. This results from NOL carryforward being used in [REDACTED] and [REDACTED] under the Service position, that would be used up in [REDACTED] through [REDACTED] under the taxpayer's position. Unfortunately, [REDACTED] and [REDACTED] are barred by the statute of limitations. (Erroneous refund is being pursued for [REDACTED] but is not available for [REDACTED].)

ANALYSIS

We hope to use the mitigation provisions of I.R.C. § 1311-1314 to reopen [REDACTED] and [REDACTED]. The requirements of the mitigation statutes may be summarized as follows:

1. An error in a year now barred by the statute of

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limitations.

2. A determination as defined in § 1313(a).
3. One of the circumstances of adjustment listed in § 1312.
4. The party prevailing in the determination must have maintained a position in the determination inconsistent with the erroneous treatment in the barred year. (This is not required for two circumstances of adjustment not relevant here.)

In the instant situation, these requirements are met as follows. The error in the barred year is the use of excessive NOL carryforwards. The determination will be the allowance of a claim for refund in the years [REDACTED], [REDACTED] and [REDACTED]. § 1313(a)(3). The circumstance of adjustment will be the double allowance of a deduction or a credit, i.e., the NOL. § 1312(2). The inconsistency will be the request for the application of the NOL against [REDACTED], [REDACTED] and [REDACTED] income, when it has been used to offset income in [REDACTED] and [REDACTED].

Obviously, in order to meet the inconsistent position requirement, taxpayers must maintain that position in their claims for refund. The amended returns for [REDACTED] and [REDACTED] do not meet this requirement because the position reflected in those returns is consistent with the original Service position and with the [REDACTED] and [REDACTED] returns. Therefore, taxpayers must file new claims for refund for [REDACTED] and [REDACTED], if we are to meet the mitigation requirement.

No statutory notice of deficiency alleging mitigation will be valid unless all of these requirements are met. This means that the "determination" must occur prior to the issuance of the statutory notice of deficiency. Thus, we may not issue the statutory notice of deficiency before we allow the credits to be posted. § 1313(3)(A).

#### CONCLUSION

As seen above, we must have new claims filed by the taxpayers for [REDACTED] and [REDACTED] in order to meet the requirements of mitigation. We may not issue the statutory notice of deficiency before we allow those claims.

  
DANIEL J. WILES